

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

PETER LEWIN

Case No. 99-14337
Chapter 7

Debtor

MICHAEL J. O'CONNOR, ESQ., AS
CHAPTER 7 TRUSTEE

Plaintiff

-against-

Adversary No. 00-90060

PETER LEWIN AND LORRAINE LEWIN

Defendants

APPEARANCES:

O'CONNOR, O'CONNOR, MAYBERGER &
FIRST

Michael J. O'Connor, Esq.
Trustee

Attorneys for Chapter 7 Trustee
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Albany, New York 12211

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The issue before the court is the burden of proof with respect to a N.Y. Debt. & Cred.
§ 273 cause of action. The court has jurisdiction over this core proceeding pursuant to 28 U.S.C.
§§ 157(a), 157(b)(1), 157(b)(2)(F, H, J) and 1334(b).

Facts

On February 29, 2000, the Chapter 7 Trustee (“Trustee”) commenced the captioned adversary proceeding against the Debtor and his wife, seeking to avoid certain transfers pursuant to 11 U.S.C. §§ 544, 550, 551 and N.Y. Debt. & Cred. L. § 273 and to deny the Debtor a discharge pursuant to 11 U.S.C. § 727(a)(2). After a trial conducted on September 19, 2000, the Trustee withdrew many of the causes of action stated in his complaint. By his letter dated October 3, 2000, he withdrew more, leaving the Third, Fourth, Fifth and Eighth causes of action. One of the key issues at trial was the burden of proof under N.Y. Debt. & Cred. L. § 273, therefore, the court directed each party to file a memorandum of law regarding that issue. The parties also took that opportunity to inform the court of their respective positions regarding the doctrine of continuing concealment. Although the continuing concealment doctrine is another important issue in the overall adversary proceeding since the property transfers occurred more than one year before the Debtor filed his bankruptcy petition, it is not relevant to the instant matter.

Argument

The Trustee asserts the plaintiff generally has the burden of proving both insolvency and the lack of fair consideration for N.Y. Debt. & Cred. L. § 273 purposes. However, he cites *ACLI Government Securities, Inc. v. Rhoades*, 653 F. Supp. 1388 (S.D.N.Y. 1987), *aff’d*, 842 F.2d 1287 (2d Cir. 1988), and quotes, “where the evidentiary facts as to the nature and value of the consideration are within the transferee's control, the burden of coming forward with evidence on the fairness of the consideration shifts to the transferee...Moreover, in an intra family transaction there is a heavier burden on the transferee to establish fair consideration for the transfer.” *Id.* at

1391. He points out no one disputes the transfers were intra family in nature and the Defendants have not disputed the Debtor made the transfers without any contemporaneous consideration.

Once inadequate consideration is established, the Trustee argues, the burden of proving solvency shifts to the transferee. He cites N.Y. Debt. & Cred. Law § 271(a)(McKinney 1990); *United States v. Orozco-Prada*, 636 F. Supp. 1537, 1541 (S.D.N.Y. 1986), *aff'd*, 847 F.2d 836 (2d Cir. 1988); *United States v. Mazze*, 245 B.R. 435 (E.D.N.Y. 1999); *United States v. Red Stripe, Inc.*, 792 F. Supp. 1338, 1342 (E.D.N.Y. 1992); *ACLI Government Securities, Inc., v. Rhodes*, 653 F. Supp. 1388; and *In re O.P.M. Leasing Services, Inc.*, 40 B.R. 1023 (S.D.N.Y. 1984), *aff'd*, 769 F.2d 911 (2d Cir. 1985), as support for his position. Although the question of whether the burden has been met is not before the court at this time, the Trustee submits the Defendants had the burden of establishing the fairness of the consideration but offered nothing other than their self-serving testimony. According to the Trustee, the Defendant offered no proof of the Debtor's wife's contributions to the business, of the hours she worked at the business or of her contributions related to its purchase. The Trustee believes the Defendants' failure to establish the adequacy of the consideration translates into a finding of inadequate consideration, thereby shifting the burden of proving solvency to them. He further submits they have not met this high burden.

Unlike the Trustee who briefed the threshold issue of who has the burden of proof, the Defendants argue, regardless of who has the burden, they have proved the Debtor transferred his assets for fair consideration. They cite N.Y. Debt. & Cred. L. § 272 (McKinney 1990) and assert the record contains sufficient evidence of how many hours the Debtor's wife worked at The Clock Center, how her work would have been worth about \$40,000 per year, why the Debtor did

not keep records about her work and the consistency between the value of the transfers she received and the amount she should have been paid for her labor.

Since they believe they proved the Debtor made the transfers for adequate consideration, the Defendants assert they had no burden to prove his solvency. Notwithstanding their belief that there was no shift in the burden, the Defendants argue the Debtor was, in fact, solvent when he made the transfers. According to them, the record shows The Clock Center did not owe its trade creditors when the Debtor transferred his one-half interest in his house. They try to distinguish the cases the Trustee relies on, contending those cases involved transfers that were made after debts had been incurred.

Discussion

I. 11 U.S.C. § 544(b)(1) and N.Y. Debt. & Cred. L. § 273

Section 544(b)(1) of the Bankruptcy Code provides, as follows:

(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

Therefore, pursuant to section 544(b)(1), a trustee can avoid a debtor's transfers or obligations, provided an unsecured creditor exists, under applicable state law.

In New York, trustees often invoke various provisions of N.Y. Debt. & Cred. L., particularly sections 271, 273, 273-a and 276. These sections cover several fraud causes of action. The Chapter 7 Trustee is pursuing a cause of action under N.Y. Debt. & Cred. L. § 273, the state law provision covering conveyances by an insolvent. It provides, in relevant part, that if an insolvent transferor makes a conveyance or a conveyance renders a transferor insolvent, then

the conveyance is “fraudulent,” if it is made without fair consideration. Under N.Y. Debt. & Cred. L. § 278(1), a creditor can set aside a fraudulent conveyance. Although not relevant in the instant matter, N.Y.C.P.L.R. 213(8) (McKinney 1990) provides for a six year statute of limitations for actions based on fraud.

II. Burden of Proof

As discussed above, section 273 sets forth a three-prong test. Proof that a fraudulent conveyance cause of action under N.Y. Debt. & Cred. L. § 273 exists when: (1) there was a transfer of property,¹ (2) the transferor made the transfer without fair consideration and (3) the transferor was insolvent when he made the transfer or was rendered insolvent by it. *See United States v. McCombs*, 30 F.3d 310, 323 (2d Cir. 1994). Generally, section 273 places the burden of proving both insolvency and the lack of fair consideration upon the party challenging the conveyance. *American Inv. Bank, N.A. v. Marine Midland Bank, N.A.*, 191 A.D.2d 690, 692 (2d Dep’t 1993). However, in certain circumstances, the burden shifts.

A. Unfair Consideration

Under N.Y. Debt. & Cred. L. § 272(a), “fair consideration” exists “[w]hen in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied.” The section provides for a two-part test regarding a conveyance: (1) good faith and (2) the receipt of property or satisfaction of an antecedent debt.

The Second Circuit has held that in an intrafamily transfer, the burden of persuasion under section 273 can shift to the transferee when one of two factors in the conveyance exists: (1) the absence of any tangible consideration or (2) a clandestine transfer of property designed to conceal

¹The Defendants do not challenge the fact that the Debtor made three property transfers.

the nature and value of the consideration. *McCombs*, 30 F.3d at 325. The Defendants assert the record contains sufficient evidence that the Debtor received adequate consideration for the various transfers. According to them, he made the transfers to his wife as payment of back wages and because she agreed to take over the payments on the transferred properties. Although they were not addressing the point relative to the second *McComb* factor discussed above, in their reply memorandum where they discuss the continuing concealment doctrine, the Defendants state the Debtor did not keep a secret interest in any of the properties he transferred and only his wife used the boat and the 1998 Chevy Suburban.

A deed provided sufficient evidence that the transferor's daughters assumed the two mortgages on the real property transferred in *McComb*. *See McComb*, 30 F.3d at 315, 325. It is the court's recollection that such documentary evidence does not exist here. Thus, it remains to be seen whether the record contains sufficient evidence to show the Debtor's wife's assumption of the mortgage. Also, while the Defendants may certainly try to persuade the court in a post-trial brief that the Debtor's payment of back wages to his wife constitutes "tangible consideration" under New York law, the lack of any documentary evidence regarding any of the transfers lends itself to a finding that "clandestine transfers" occurred here. If the court ultimately makes that finding, the burden would shift to the transferee (i.e., the Debtor's wife) to show the Debtor received fair consideration for the transfers.

B. Insolvency

N.Y. Debt. & Cred. L. 270(1) defines a person as "insolvent" when "the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." Citing *GaNun v. Palmer*, 216 N.Y.

603, 611 (1916), the Second Circuit has indicated Section 273 embodies the judge-made presumption that transfers made without consideration by one who is a debtor raises a presumption of fraud. *Feist v. Druckerman*, 70 F.3d 333, 335 (2d Cir. 1934). According to the Second Circuit, the creditor may stand on the presumption of insolvency and need not show what other property the transferor retained; the transferee has the burden of going forward with proof to show the transferor's solvency in order to prevent the transfer from being set aside. *Id.*

Here, once the parties overcome the initial burden of proof hurdle regarding consideration, they will face the second hurdle: proving insolvency or solvency as the case may be. The Trustee faces this burden initially; he must show insolvency. However, if he shows the Debtor made the transfers without consideration (i.e., he received **no** consideration), the burden will shift to the Debtor's wife and she will have to prove the Debtor's solvency when he transferred each of the three properties to her.

III. Summary

In order for the court to determine the underlying causes of action, the parties must obtain a trial transcript and then file and serve a post-trial brief with proposed findings of fact and conclusions of law. As this decision outlines above, in order for the Trustee to prevail on a section 273 cause of action, he will have to prove inadequate consideration and insolvency. He can meet his burden regarding inadequate consideration by showing a lack of good faith or, because the Debtor did not receive property in return, the non-existence of a legitimate antecedent debt owed to the Debtor's wife. Furthermore, if the Trustee actually proves the Debtor received no consideration for the transfers, the burden will shift to the Debtor's wife to show the Debtor received fair consideration and was solvent when he made each transfer.

Accordingly, it is

ORDERED that the parties obtain the transcript of the September 2000 trial; and it is further

ORDERED that once the transcript is filed, the Trustee shall inform the court, in writing, of the dates that each party will file and serve a post-trial brief, using the burden of proof guideline discussed in this opinion, and when reply briefs, if any, will be filed and served.

Dated:

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge